Supreme Court, U. S.
FILED
MAY 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1646

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

ALFRED BEARD,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

JOHN J. BALLUFF,
MATTHEW H. WITTEMAN,
RICHARD L. ROSETT,
121 East Sixth Street,
Room 448,
Los Angeles, Calif. 90014,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Petition for a Writ of Certiorari to the Supreme Court of the State of California	1
Citations to Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	4
A. Unlimited Judicial Extension of the Federal Safety Appliance Act Raises an Important Question of Federal Law and Its Administration	4
B. The Court Below Wrongly Decided This Important Federal Question: Whether the Safety Appliance Act Applies to Trespassing Train Riders	5
C. This Is Petitioner's First Opportunity to Present the Question of the Applicability of the Federal Safety Appliance Act Vis-a-Vis a Trespaser	7
D. There Is No Separate, Independent State Ground to Support the Judgment	8
E. This Court Has Previously Considered the Applicability of the Federal Safety Appliance Act to Persons Other Than Railroad Employees to Be Sufficiently Important to Grant Certiorari	9
Conclusion	10

INDEX TO APPENDICES

Appendix A.	45 U.S.C.A. § 11	App. p. 1
Appendix B.	Opinion of the Court of Appeal	2
Appendix C.	Petition for Rehearing Denied	20
Appendix D.	Hearing Denied	21

TABLE OF AUTHORITIES CITED

Cases	Page
Enterprise Irrigation District v. Farmers Mutual Canal Co., 1916, 243 U.S. 157, 61 L. Ed. 644, 37 S. Ct. 318	8
Fairport P. & E. R. Co. v. Meredith, 1933, 292 U.S. 589, 78 L. Ed. 146	4, 5
Ivanhoe Irrigation District v. McCracken, 1958, 357 U.S. 275, 2 L. Ed. 2d 1313, 78 S. Ct. 1174	8, 9
Minnesota v. National Tea Company, 1940, 309 U.S. 551, 84 L. Ed. 920, 60 S. Ct. 676	8
Missouri and Kansas R. Co. v. Olathe, 1911, 222 U.S. 185, 56 L. Ed. 156	7
Republic Natural Gas v. Oklahoma, 1947, 334 U.S. 62, 92 L. Ed. 1219	7
Robertson & Kirkham, 1951, Jurisdiction of the Supreme Court, Sec. 35, p. 67	7
Shields v. Atlantic Coast Line R. Co., 1955, 350 U.S. 318, 76 S. Ct. 386, 100 L. Ed. 364	5, 9
Urie v. Thompson, 1948, 337 U.S. 163, 93 L. Ed. 1282	7

Miscellaneous	
Accident Bulletin No. 139, "Summary and Analysis of Accidents on Railroads in the United States," 1970, Department of Transportation, Federal Railroad Administration, Bureau of Railroad Safety	6
Accident Bulletin No. 140, "Summary and Analysis of Accidents on Railroads in the United States," 1971, Department of Transportation, Federal Railroad Administration, Office of Safety	6

Page

Accident Bulletin No. 141, "Summary and Analysis of Accidents on Railroads in the United States," 1972, Department of Transportation, Federal Railroad Administration, Office of Safety 6

Statutes

California Penal Code, Sec. 587 .....2, 10

United States Code, Title 28, Sec. 1257(3) 2

United States Code, Title 45, Sec. 11 2

Textbook

Stern & Gressman, Supreme Court Practice, p. 103, para. 31.3 7

IN THE

Supreme Court of the United States

October Term, 1974
No. .....

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

ALFRED BEARD,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays a Writ of Certiorari issue to review judgment of the California Supreme Court entered February 9, 1974.

Citations to Opinion Below.

The second Opinion of the California Court of Appeal (Appendix B), is unreported, but is based upon "the law of the case" in the reported Court of Appeal Opinion upon the first appeal (Appendix B, p. 2).

Jurisdiction.

The unreported Court of Appeal judgment (Appendix B) was entered December 13, 1973. Rehearing was denied January 10, 1974. Petition for hearing to the Supreme Court of the State of California was denied February 7, 1974.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the Federal Safety Appliance Act was enacted to benefit a trespasser stealing a ride on a freight train and suffering injuries thereby.

2. Whether the Federal Safety Appliance Act was enacted to benefit a trespasser injured in stealing a ride on a freight train when such conduct constitutes a crime under the law of the State where the injury occurs (California Penal Code §587).

Statute Involved.

The statutory provision involved is 45 U.S.C. §11 (Appendix A, *infra*, p. 1).

Statement.

Respondent, 14, on his way home from junior high school with a gang of friends, hopped Petitioner's slow-moving freight train in Los Angeles, fell off and lost his legs. This is how it happened, he testified [Rep. Tr. 762]:

> "Q And just describe for us what you did and what happened.
>
> A Well, I was running alongside the train . . . to keep up the pace. I grabbed the hand bar with my right hand, and then with my left hand, still running, then I hopped on with my right foot on the foot bar, and then with my left foot on the foot bar.
>
> Q And what happened when you put your feet on the foot bar?
>
> A Well, that's when the foot bar gave way.

Q And which way did it give way?

A Forward, in toward the train.

Q And what happened to you when the foot bar gave way?

A I went underneath the train."

On the basis of his testimony the trial court instructed the jury on the alleged violation of the Safety Appliance Act, as follows [Rep. Tr. 3102]:

> "A law of the United States provides as follows, in part:
>
> 'It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with *secure sill steps* and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders. . . .'
>
> If you find that the defendant violated the safety order just read to you and that such violation was a proximate cause of injury to plaintiff, you will find that such violation was evidence of defendant's negligence." [Rep. Tr. 3103] (Emphasis added).

A general verdict was returned in Respondent's favor. He had charged, besides negligent policing of the area, that Petitioner negligently maintained a loose sill step on a box car, causing him to fall beneath the wheels (Court of Appeal Opinion, Appendix B, p. 2).

REASONS FOR GRANTING THE WRIT.

A. Unlimited Judicial Extension of the Federal Safety Appliance Act Raises an Important Question of Federal Law and Its Administration.

Congress never intended the Federal Safety Appliance Act to benefit someone stealing a ride on a train.

The entire legislative history of the Act and its judicial interpretation is to the contrary. No known decision of any Federal or State Court within the United States has come to the conclusion of the California Court of Appeal that a trespasser is intended to be protected by the Federal Safety Appliance Act.

True, it has been held that the Safety Appliance Act was not enacted for the exclusive benefit of employees. This was pointed out in *Fairport P. & E. R. Co. v. Meredith*, 1933, 292 U.S. 589, 78 L. Ed. 1446, where the court discussed the Legislative history of the Act, at pages 1449-1450:

> "Very likely, the primary purpose in the mind of Congress was to protect employes and passengers. So much is indicated by the title—'An act to promote the safety of employes and travelers upon railroads' etc. And this is borne out by the history of the legislation. President Harrison in his first annual message to Congress called attention to the need of legislation for the better protection of the lives and limbs of those engaged in operating the interstate freight lines of the country, and especially the yardmen and brakemen, and expressed the view that Congress had power to require uniformity in the construction of cars used in interstate commerce and the use of approved safety appliances upon them."

> "But we are asked to hold that the title expressed the sole intent of the act, and his involves a question of statutory construction. The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity."

The court in *Fairport* held that the benefits of Sections 1 and 9 of the Act, concerning brakes, were applicable to employees, passengers and travelers on the highways at crossings.

Twenty-two years later, the United States Supreme Court extended the protection of the Safety Appliance Act to a person who had legitimate business on and about a railroad car—a consignee's employee (*Shields v. Atlantic Coast Line R. Co.*, 1955, 350 U.S. 318, 76 S. Ct. 386, 100 L. Ed. 364).

The reported cases are clear that the Federal Safety Appliance Act was intended only to benefit those persons who have a duty or right to be in or upon or near railroad cars or engines or trains. A teenage trespasser hopping a freight ride is not such a person!

B. The Court Below Wrongly Decided This Important Federal Question: Whether the Safety Appliance Act Applies to Trespassing Train Riders.

As a result of the opinion (Appendix B), every person injured in stealing a ride on a freight train may find monetary help in the Federal Safety Appliance Act, if he comes to believe that his troubles really

resulted from an insecure sill step or some other safety appliance defect. Such mischief should be nipped in the bud.

According to studies published by the Federal Railroad Administration (Department of Transportation), a nationwide total of 1,239 trespassers were killed or injured on railroads in 1970.[1] The corresponding figure for 1971[2] was 1,158; for 1972[3] 1,123. The compiled figure for 1973 has yet to be published.[4]

With ever expanding concepts of tort law, and ever rising hopes of litigants, nationwide, it is fair to assume that a large number of these deaths and injuries will spawn litigation, nationwide, with the result that the Federal Safety Appliance Act ruling of the California Court of Appeal will be sought out and applied, to benefit the trespasser, unless the Court settles this important Federal question.

The opinion of the Court of Appeal (Appendix B) stands like a state law specifically applying the protection of the Federal Safety Appliance Act to all persons including trespassers. If such a law were enacted it would surely be struck down as a Burden on Interstate Commerce!

---

[1]Accident Bulletin No. 139, "Summary and Analysis of Accidents on Railroads in the United States," 1970, Department of Transportation, Federal Railroad Administration, Bureau of Railroad Safety.

[2]Accident Bulletin No. 140, "Summary and Analysis of Accidents on Railroads in the United States," 1971, Department of Transportation, Federal Railroad Administration, Office of Safety.

[3]Accident Bulletin No. 141, "Summary and Analysis of Accidents on Railroads in the United States," 1972, Department of Transportation, Federal Railroad Administration, Office of Safety.

[4]The yet unpublished nationwide figure for 1973 is 1,114.

C. This Is Petitioner's First Opportunity to Present the Question of the Applicability of the Federal Safety Appliance Act Vis-a-Vis a Trespasser.

There was no final judgment in this case after the California Supreme Court denied a hearing upon a Court of Appeal decision reversing a nonsuit in Petitioner's favor, in the prior and first appeal of this case (See Appendix B, Court of Appeal Opinion, second appeal, p. 2). The nonsuit was simply reversed for a trial of the facts consistent with the first appellate opinion. Therefore, this is Petitioner's first opportunity to petition this Court for a writ of certiorari, upon the questions stated relating to the Federal Safety Appliance Act. (See Stern & Gressman, *Supreme Court Practice*, p. 103, para. 31.3; *Missouri and Kansas R. Co. v. Olathe*, 1911, 222 U.S. 185, 56 L. Ed. 156). Conversely, any effort to have obtained a writ of certiorari in this court, at the end of the initial appellate process, would probably have been rejected, to avoid "piecemeal" review of state court proceedings (See *Republic Natural Gas v. Oklahoma*, 1947, 334 U.S. 62, 92 L. Ed. 1219).

Only after the California Supreme Court denied a hearing in this case, at the conclusion of the second appeal, on February 7, 1974, was there truly any finality in the state court proceedings.

The "Federal question" is now for the first time properly presented for review as incorporated in a "final" judgment (See *Urie v. Thompson*, 1948, 337 U.S. 163, 93 L. Ed. 1282, 1285; *cf. Jurisdiction of the Supreme Court*, Robertson & Kirkham, 1951, p. 67, Sec. 35).

D. There Is No Separate, Independent State Ground to Support the Judgment.

Assuming, *arguendo,* a state ground of common law negligence otherwise adequate to support the judgment below, the applicability of the Federal Safety Appliance Act as a measure of such negligence (Appendix B, p. 2) is so interwoven therewith as to render the state and Federal grounds inseparable. This is so because the only ground before the jury was whether Petitioner was negligent and a governing criteria given them was a sill step violation of the Federal Safety Appliance Act.

This court has acted before to grant certiorari where so-called state grounds were less interwoven with Federal grounds than here. In (*Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 1916, 243 U.S. 157, 164, 61 L. Ed. 644, 649, 37 S. Ct. 318), the court pointed out that:

> ". . . where the non-Federal ground is interwoven with the other as not to be an independent matter, or it is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." (61 L. Ed. at 649).

Because the Federal ground is so interwoven with the so-called state ground, there is reason to believe that the Federal Safety Appliance Act, as given the jury, influenced the judgment below (*cf. Minnesota v. National Tea Company,* 1940, 309 U.S. 551, 84 L. Ed. 920, 923, 60 S. Ct. 676).

Apposite is a cryptic observation of this court in *Ivanhoe Irrigation District v. McCracken,* 1958, 357

U.S. 275, 2 L. Ed. 2d 1313, 1325, 78 S. Ct. 1174; "Basically, it is the interpretation of the Federal Act that opens the door to the application of the state law. . . ."

E. This Court Has Previously Considered the Applicability of the Federal Safety Appliance Act to Persons Other Than Railroad Employees to Be Sufficiently Important to Grant Certiorari.

In *Shields v. Atlantic Coast Line R. Co.*, 1955, 350 U.S. 318, 100 L. Ed. 364, 76 S. Ct. 386, cited above, Petitioner was injured unloading a railroad tank car, because of a defect in the dome running board upon which he was standing. He sought damages alleging a violation of the Safety Appliance Act and common law negligence. On appeal from a judgment entered on a general verdict in his favor, the Court of Appeal reversed, holding that the trial court erred in instructing that the dome running board was a safety appliance (220 F. 2d 242). The majority opinion of this court reversed the Court of Appeal. The majority held the dome running board to be a safety appliance within the meaning of the Safety Appliance Act, though the ICC had failed to specify uniform standards for such boards. The court further held Petitioner to be within the group entitled to the protection of the Safety Appliance Act, notwithstanding he was not a railroad employee.

Said the majority: "*We granted certiorari because of the importance of the questions raised as to the proper interpretation of the Safety Appliance Act.* 350 U.S. 819, 100 L. Ed. 733, 76 S. Ct. 61." (100 L. Ed. at 367) (Emphasis added).

The majority ordered a reversal of the Court of Appeal and the reinstatement of the judgment of the District Court upon the verdict. A three-Justice dissent took the view that the dome running board was not a safety appliance within the meaning of the statute.

There apparently was no question in the mind of any one of the Justices about the necessity to grant certiorari because of the "importance of the questions raised as to the proper interpretation of the Safety Appliance Act."

The same importance attaches to the questions presented here, whether the Federal Safety Appliance Act was enacted to benefit a trespasser stealing a ride on a freight train and whether that Act should benefit such a person when his conduct constitutes a crime under state law (California Penal Code §587).

Conclusion.

For each and all of the foregoing reasons, this Petition should be granted.

Respectfully submitted,

JOHN J. BALLUFF,
MATTHEW H. WITTEMAN,
RICHARD L. ROSETT,
By MATTHEW H. WITTEMAN,
Counsel for Petitioner.

APPENDIX A.

45 U.S.C.A. § 11.

§11. *Safety appliances required for each car; when hand brakes may be omitted*

It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat. 298.

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Alfred Beard, Plaintiff and Respondent, v. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendant and Appellant. 2d Civ. No. 40540 (Sup. Ct. No. 834783).

Filed: Dec. 13, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry Pacht, Judge. Affirmed.

John J. Balluff, Matthew H. Witteman, Henry M. Moffat, Neal W. McCrory, Richard L. Rosett, and Matthew H. Witteman and Richard L. Rosett for Defendant and Appellant.

Irving H. Green for Plaintiff and Respondent.

Defendant appeals from a judgment in favor of plaintiff for personal injuries sustained when plaintiff, age fourteen, attempted to board a moving freight train operated by defendant, and fell under the train losing both of his legs. At a previous trial of the matter a judgment of nonsuit granted at the conclusion of plaintiff's case was reversed on appeal by Division 2 of this court in *Beard v. Atchison, Topeka & Santa Fe Ry. Co.*, 4 Cal.App.3d 129.

On March 8, 1963, Alfred Beard, a junior high school student, was on his way home from school with a group of his friends. They crossed Slauson Avenue and entered the railroad right of way running north of Slauson Avenue. Two of plaintiff's friends hopped aboard the freight train and rode for some dis-

tance on the side of a boxcar. Alfred then ran up to the train, reached for a grab iron, pulled himself up and put his feet on the sill step of a boxcar. When he put his feet on the sill step, it gave way inward. Alfred fell underneath the train and it ran over his legs.

The train passed by this location approximately the same time every afternoon. Several of the boys had hopped a ride on the train on previous occasions. Alfred had walked along these tracks before and had seen other boys riding on the trains on other occasions. He had never hopped a train ride himself before. He testified that he had not been warned beforehand that it was dangerous to hop rides on trains.

The five-man crew of the train was unaware of the accident at the time it happened and did not see any boys attempting to board the train. After the police notified the company of the accident an inspection of the train was made and no mechanical defects were discovered.

Appellant makes a number of contentions of error relating to instructions and rulings upon defendant's duty of care toward plaintiff and plaintiff's alleged contributory negligence in light of plaintiff's status as a trespasser on defendant's property. We find that these contentions were resolved against appellant in the prior appeal of this case in *Beard v. Atchison, Topeka & Santa Fe Ry. Co., supra,* 4 Cal.App.3d 129. Under the doctrine of the law of the case, we adhere to the rulings made in that case by Division 2 of this court. Under the doctrine of law of the case a prior appellate decision on a principle or rule of law necessary to the case must be adhered to throughout subsequent trial

and appeal of the matter. (*Tally v. Ganahl,* 151 Cal. 418, 421.) We are well aware that the doctrine of law of the case is merely a rule of procedure and will not be followed where its application will result in an unjust decision. (*People v. Medica,* 6 Cal.3d 484, 492; *DiGenova v. State Board of Education,* 57 Cal.2d 167, 179.) Nevertheless, in the absence of compelling circumstances, the decision in the prior appeal should be adhered to. The trial court had no choice but to follow the law as declared in the prior appeal. (*Estate of Baird,* 193 Cal. 225, 258.) Appellant cites us to no changes in statutory law or controlling decisional law since the prior *Beard* decision which compel a contrary result.

Therefore we reject each of the following contentions: 1. Appellant contends that the court erred in instructing the jury that the Federal Safety Appliance Act, section 11 of title 45 of the United States Code, requires in part that "[a]ll cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders. . . ." and that if the jury find that defendant violated that statute and such violation was a proximate cause of injury to the plaintiff the jury will find that such violation was evidence of defendant's negligence. Appellant contends that the federal safety statute was intended to protect only railroad workers and other persons with legitimate reasons to climb on freight cars and that plaintiff, as a trespasser, was not one of the class of persons for whose protection the statute was adopted. (Evid.

Code § 669 (a)(4).) This position was rejected in the prior *Beard* opinion. The court was well aware of the purposes of the Federal Safety Appliance Act and held that it did not impose absolute liability on the railroad. (4 Cal.App.3d at pp. 141-42.) The court ruled, however, "[t]o establish the railroad's negligence plaintiff relied on two factors. . . . Second, plaintiff charged the railroad with negligence in maintaining a loose sill step on a box car, which caused plaintiff to fall from the box car beneath the wheels of the train. Clearly, this second factor charged the maintenance of railroad property in a dangerous and defective condition in violation of a safety statute, a violation which, if true, would furnish some evidence of the railroad's negligence. (*Alarid v. Vanier*, 50 Cal.2d 617 . . . cf. Evid. Code, § 669.) Either factor, if given credence, might be sufficient to support plaintiff's claim that defendant had been negligent, for both involved a reasonably foreseeable risk of harm to others arising out of a want of ordinary care in the management of defendant's property." (4 Cal.App.3d at p. 137.) The trial court therefore properly applied the prior appellate decision in instructing the jury that violation of the federal statute constituted evidence of negligence. But in any event the recent case of *Cappa v. Oscar C. Holmes, Inc.*, 25 Cal.App.3d 978, 982-83, squarely supports the result.

2. Appellant contends that the court erred in instructing the jury that plaintiff's status (as a trespasser) was not material to the existence of the duty of the defendant to exercise due care to avoid injury to him, and in refusing defendant's requested instruction that a finding that plaintiff was a trespasser is a factor to be considered by the jury but not the determining factor.

Appellant claims that the instruction given was inconsistent with the language in the prior *Beard* case that "[t]he possessor's duty of ordinary care extends to invitees and trespassers alike, although the foreseeability of injury, and hence the degree of care required of a possessor, continues to be influenced by the likelihood that persons will be present on the property at a particular time and place, a likelihood normally considerably greater for invitees than for trespassers" and the language in *Rowland v. Christian,* 69 Cal.2d 108, 119, that "although the plaintiff's status of a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." This is without merit. The statement that the foreseeability of injury is normally greater for invitees than trespassers is simply a deduction to be drawn from the particular factual circumstances and is not a principle of law on which the jury required instruction. The jury was properly instructed that the railroad's duty to exercise ordinary care extended to persons whom it was reasonably foreseeable would be on the premises, and that if defendant knew the children of plaintiff's age would be present in the area or boarding trains, it was under a duty to exercise reasonable care to prevent injury to such persons. *Rowland* itself recognizes that "[t]hus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true." (69 Cal.2d at pp. 117-18.) Appellant's proposed instruction was not helpful or material and was properly refused.

3. Appellant contends that the court erred in modifying BAJI Instruction 3.35 relating to the standard

of conduct for a minor. The instruction states that a child is only required to exercise the degree of care which ordinarily is exercised by minors of like "maturity, intelligence and capacity under similar circumstances." The court inserted two additional words, "experience" and "age," so that the jury was instructed: "It is for you to determine whether the conduct of plaintiff Alfred Beard was such as might reasonably have been expected of a minor of his maturity, intelligence, experience, age, and capacity, acting under similar circumstances." We fail to see how appellant could have been prejudiced by the insertion of "experience" and "age" in the instruction. It seems that in some cases the courts have used the phrases "age, experience, and intelligence" and "maturity, intelligence, and capacity" interchangeably. (*Daun v. Truax*, 56 Cal.2d 647, 654, 655.) In any event the appellate court in *Beard* stated: "The rules on contributory negligence outlined in Restatement Second Torts are applicable, and to establish the defense the defendant must show that plaintiff's conduct fell below the standard of care required of him in the light of his age, intelligence, and experience, and that as a consequence of this plaintiff was injured. [Citing Restatement Second Torts § 464(2).]" (4 Cal.App.3d at p. 139.) The trial court did not err in following the appellate court's language.

4. Appellant contends that because plaintiff violated Penal Code section 587b[1] he was contributorily

[1]"Every person, who shall, without being thereunto authorized by the owner, lessee, person or corporation operating any railroad, enter into, climb upon, hold to, or in any manner attach himself to any locomotive, locomotive-engine tender, freight or passenger car upon such railroad, or any portion of any

(This footnote is continued on next page)

negligent as a matter of law. This argument was also rejected in the previous *Beard* decision where the court said: "Undoubtedly proof of plaintiff's violation of the statute furnishes some evidence that plaintiff's conduct was negligent. Such evidence, however, does not conclusively prove negligence but merely establishes a rebuttable presumption that plaintiff failed to exercise due care." (4 Cal.App.3d at p. 140; *see also* Evid. Code § 669(b)(2); *Daun v. Truax, supra,* 56 Cal.2d 647, 654-55.)

5. Appellant also contends that plaintiff was contributorily negligent as a matter of law based upon an 1898 decision, *Studer v. Southern Pacific Co.,* 121 Cal. 400, where the Supreme Court held it was contributory negligence as a matter of law for a twelve year old to hop on and over a standing freight train. However, the prior *Beard* decision discussed *Studer* at length and held that it was not controlling. (4 Cal. App.3d at pp. 139-40.)

6. Appellant contends that the court erred in instructing the jury that "[i]f you find that plaintiff's injury was caused by an insecure sill step, then you are instructed that plaintiff did not assume the risk of injury therefrom." This was in accord with the prior decision in *Beard* which pointed out that even if plaintiff assumed the normal risks of hopping aboard a freight train, or was negligent in that respect, he did not necessarily assume the risk of a defective sill step "[s]ince one cannot assume a risk of which one is unaware . . . ." (4 Cal.App.3d at pp. 138, 140.)

---

train thereon, shall be deemed guilty of a misdemeanor, and, upon conviction thereof shall be punished by a fine not exceeding fifty dollars ($50), or by imprisonment not exceeding 30 days, or by both such fine and imprisonment."

Since no evidence was developed at trial that plaintiff was aware of the defective sill step, the court's instruction was proper.

7. What we have said easily disposes of appellant's contention that the court erred in permitting plaintiff to examine the brakeman with regard to the sill step. The sill step was a proper issue in the case.

8. Appellant contends that the court erred in instructing counsel for appellant not to refer to plaintiff as a "trespasser" during the trial. The matter was argued at length prior to trial. The prior *Beard* decision had held that "[t]he status of a claimant at the time of his injury no longer affects the general duty of the possessor of property to exercise ordinary care with respect to reasonable foreseeable risks of personal injury to persons coming on the property. The possessor's duty of ordinary care extends to invitees and trespassers alike, although the foreseeability of injury, and hence the degree of care required of a possessor, continues to be influenced by the likelihood that persons will be present on the property at a particular time and place, a likelihood normally considerably greater for invitees than for trespassers. (Cf. *Rowland v. Christian,* 69 Cal.2d 108 at p. 119. . . .) The former gradations of degree in the possessor's duty of care, which varied with the status of persons on the property, have been superseded by a generic duty owed to all persons on the property based on the reasonable foreseeability of harm to them. Under *Rowland v. Christian* the extent of a possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured." (4 Cal.App.3d at p. 136.) The trial court properly ruled that plaintiff's status as

a trespasser was no longer material to the case. The reasonable foreseeability of plaintiff's being in the area or boarding the train was an issue, but the trial court believed that the facts concerning that issue could be fully explored without the necessity of attaching a legal term of opprobrium to that conduct. The trial court believed that since plaintiff's legal status as a trespasser was not a material issue in the case, under the circumstances the probative value of the use of that term would be outweighed by its prejudicial and inflammatory effect. (See Evid. Code § 352.) The trial court's ruling was within its discretion.

We turn now to appellant's other contentions. Appellant contends that the court erred in giving an instruction which discussed negligence and contributory negligence without also referring to assumption of risk.[2] This is without merit. The jury was elsewhere instructed on assumption of risk. The jury was well aware that "[i]f plaintiff assumed the risk of harm from boarding the trains he may not recover damages for an injury resulting therefrom." Clearly the instruction complained of did not remove the issue of assumption of risk from the case. Moreover the jury was fully instructed on contributory negligence and the nec-

---

[2]"PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 4

"A plaintiff who was injured as a proximate result of some negligent conduct on the part of a defendant is entitled to recover compensation for such injury from that defendant.

"Thus, the plaintiff is entitled to a verdict in this case if you find, in accordance with my instructions:

"1. That defendant was negligent;

"2. That such negligence was a proximate cause of injury to the plaintiff; and

"3. That the plaintiff was not himself negligent; or, if negligent, that his negligence did not contribute as a proximate cause to his injury." (BAJI 3.01 as modified.)

essary overlap between the defenses of contributory negligence and assumption of risk under the circumstances probably would have rendered it nonprejudicial even if the court had not instructed upon assumption of risk at all. (*Grey v. Fibreboard Paper Products Co.*, 65 Cal.2d 240, 246.)

Appellant contends that the court erred in instructing on the special standard of care of minors.[3] He contends the instructions were not applicable because an exception to the general rule on a minor's standard of care arises where a minor engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required. (*Prichard v. Veterans Cab Co.*, 63 Cal.2d 727, 732.) This is clearly without merit. The case cited by appellant involves driving a motor vehicle, for which a license and adult qualifications are required. Hopping rides on freight trains is not an adult activity and is not one for which adult qualifications or license are required.

---

[3]"BAJI 3.35

"STANDARD OF CONDUCT FOR MINOR

"A minor is not held to the same standard of conduct as an adult. He is only required to exercise the degree of care which ordinarily is exercised by minors of like maturity, intelligence and capacity under similar circumstances. It is for you to determine whether the conduct of plaintiff Alfred Beard was such as might reasonably have been expected of a minor of his maturity, intelligence, experience, age, and capacity, acting under similar circumstances."

"BAJI 3.38

"CARE REQUIRED FOR SAFETY OF MINOR

"Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result."

Appellant contends that the court erred in refusing appellant's requested instruction BAJI 14.72 that instruction on the subject of damages must not be considered as intimating any view on the issue of liability. This issue was adequately covered by other instructions given by the court.[4]

Appellant contends that the court erred in admitting testimony by one of appellant's playmates that on other occasions between January and March of 1963 he had ridden on the train, had seen other boys riding it, and that he did not see the railroad employees do anything to keep them off. This is without merit. There was testimony from other boys that they regularly hopped rides on the trains and were not kept off by the railroad employees. An employee of a gas station across the street from the scene of the accident also testified that he regularly saw the boys hop rides on the train. The testimony was relevant to notice to the railroad that boys were riding the trains and to the steps, if any, taken by the railroad to prevent injury to such persons.

Appellant contends the court erred in admitting testimony by plaintiff that he had difficulty adjusting with the other boys in the neighborhood. Appellant claims the testimony was immaterial and prejudicial. On the contrary, the testimony was relevant to plain-

---

[4]The court instructed in the language of BAJI 15.22 that:

"ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE.

"The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict."

tiff's evidence that his susceptibility to peer group pressure impaired his judgment.

Appellant contends that the court erred in refusing to excuse a juror after the trial had begun, upon receipt of a letter to the court from the juror's employer alleging that further jury service would be a financial hardship on the juror. The trial court pointed out that he had heard nothing from the juror directly. Counsel for plaintiff stated that the jurors had been carefully examined prior to trial as to whether it would be a hardship for them to serve and that they had not requested to be excused. Under the circumstances the trial court was within its discretion in declining to excuse the juror.

Appellant argues that the jury panel was not drawn in accordance with Code of Civil Procedure section 206 in that at the time of this trial, which occurred in the Central Judicial District of Los Angeles County, the policy of the court was to draw the names of voters residing within the boundaries of the central district rather than voters residing throughout the entire County of Los Angeles. Although appellant made a motion for "mistrial" shortly after the jury was sworn, on the ground that the composition of the jury panel denied appellant equal protection of the law, appellant did not present to the trial court the specific objection that the statutory requirements had not been followed, and therefore this objection will not be considered for the first time on appeal. (*Estate of Wall,* 187 Cal. 50, 55; *Fall v. Coastwise Line,* 116 Cal.App.2d 345, 349-51; *see also People v. Sirhan,* 7 Cal.3d 710, 751.)

Appellant contends that the court erred in refusing appellant's requested instruction BAJI 14.70 on the

meaning of "present cash value." The court refused it on the basis "it is the utmost in self-delusion for courts to believe that jurors can hear, understand, remember and apply this instruction after simply hearing it read once as one of dozens of instructions." In the absence of a table of present values or other expert evidence on the present cash value factor, the trial court's ruling was fully supported by *Wilson v. Gilbert*, 25 Cal.App. 3d 607, 613-14.

Appellant contends that the court erred in admitting certain expert opinion testimony. Joseph Stanton, a psychologist and vocational rehabilitation expert, testified on the basis of a hypothetical question substantially describing plaintiff's leg injuries and scholastic achievements, that on the basis of his experience it was his opinion that with such injuries a person had an employability of 40 to 50 percent of that of a person without such injuries. Appellant contends that this opinion was speculative, without sufficient foundation, and not a proper subject of expert testimony. We disagree. Mr. Stanton had been a supervisor in the State Department of Rehabilitation from 1937 until 1960, and was a consultant for the Bureau of Hearings and Appeals of the Social Security Administration. His work involved training and obtaining employment for injured persons, and he had experience in his own caseload and in his office with amputees. His opinion was based on the fact that a double leg amputee would be unable to perform in many occupations and on the reluctance of many employers to hire handicapped persons. The testimony was admissible expert opinion. (Evid. §§ 801, 805.)

Appellant contends that the court erred in excluding testimony by a Dr. Lattin concerning an alleged con-

versation he had on the telephone with plaintiff's mother. Out of the presence of the jury Dr. Lattin testified that he treated Alfred for his injuries on March 8, 1963, and that the following day he was called to the telephone. A female voice on the other end identified herself as Alfred's mother. He had never met plaintiff's mother and did not know her voice on the telephone. She inquired about the condition of the boy and he told her that he had lost both legs. She further stated "that the boys had been riding trains, and had been cautioned to stop riding them." She did not say what "boys." The doctor could not remember any other parts of the alleged conversation. He did not remember any discussion of how the injury had occurred. The doctor's recollection of the conversation had been refreshed prior to trial by reading a memorandum of a statement he made on October 10, 1966, to a representative of the railroad.

The trial court held that the doctor's testimony was not admissible for the reasons indicated in the margin.[5]

---

[5]"I believe that the foundation leaves some doubt as to its reliability as to the identification of the other party to the conversation, but equally, if not more important, I believe that the witness has no present memory of the conversation sufficient to allow him to testify to it, in other than conclusionary terms, with the possible exception of one fact matter, which if testified to, and if admitted into evidence, would appear to be a statement inconsistent with that made by Mrs. Beard on other occasions, including the trial of this action at this time.

"I am persuaded further that the time lapse between the event, the conversation which this witness says he had, and the time when he first made any record of it, or so far as we know, spoke to anybody about it, was such, and the circumstances surrounding the entire event were such that it suggests that his memory, to the degree that he has a memory about the conversation, is based entirely on a refreshing of that memory by conversations with persons not party to that conversation, the conversation with Mrs. Beard.

(This footnote is continued on next page)

The trial court apparently was of the opinion that appellant had not introduced evidence sufficient to sustain a finding that the alleged conversation was in fact the personal knowledge of the witness. (Evid. Code § 403 (a)(2); *see Alvarado v. Anderson,* 175 Cal.App.2d 166, 179.) As indicated by the trial judge in his remarks on the motion for new trial the question was a difficult and close one in view of the preference for admission of testimony when there is sufficient evidence to sustain a finding by the jury that the preliminary fact exists. (*See Granville v. Parsons,* 259 Cal.App.2d 298, 304.) In any event, we are satisfied that the ruling did not result in substantial prejudice to appellant. In light of all the uncertainties about the testimony, the inability of the doctor to positively identify the caller, his inability to testify as to the exact terms of the conversation, the fact that the conversation was originally recalled in a 1966 interview with a representative of appellant, further lapse of time to the date of the second trial, all suggest that had the testimony been admitted in the trial it would have been of very little probative value.[6] Both Alfred and his mother testified that she had never warned him about the dangers of riding on trains, and

---

"As I said, I believe an insufficient foundation is laid to permit the introduction of a hearsay statement to be used by way of proof through an inconsistent statement of fact which is in dispute.

"I am of the further view that even with a foundation laid, even if I were persuaded as to the ability of this witness to relate the conversation which he says he had, and in precise detail, all of the surrounding circumstances are such as to suggest the invocation of the provisions of Section 352 of the Evidence Code, . . ."

[6]Indeed, the alternative ground of the trial court's ruling was that the probative value of the evidence was outweighed by its prejudicial effect. (See *Granville v. Parsons, supra,* 259 Cal. App.2d 298, 305.)

the jury could examine their demeanor. The exclusion of the doctor's testimony did not prevent appellant from arguing that plaintiff had been told by his mother not to hop on the trains, because Mr. Huenergardt, appellant's investigator, testified that he interviewed both Mrs. Beard and plaintiff's aunt, and that they each told him that Mrs. Beard had previously warned plaintiff not to hop the trains. Moreover, whether plaintiff had been warned by his mother not to ride the trains was hardly the crucial issue. Both the expert evidence and common sense suggest that it is perfectly natural for fourteen year old boys, particularly under peer group pressure, to do many things their parents have warned them not to do. Furthermore, as pointed out in the previous *Beard* decision, even if plaintiff was aware of the normal dangers of hopping a moving train, this does not necessarily mean that he assumed the risk or was contributorily negligent as to other dangerous conditions, such as a defective sill step, of which he was not aware. We agree with the trial court that regardless of the correctness of the ruling on Dr. Lattin's testimony, it did not materially affect the outcome of the trial.

Appellant contends that the court erred in admitting testimony that Mr. Huenergardt, claims investigator for the railroad, discussed the possibility of settling plaintiff's claim with Mrs. Beard. It contends the evidence was inadmissible under Evidence Code section 1152 (a), which provides that: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or state-

ments made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it." We disagree. The statute renders evidence of a compromise or settlement offer inadmissible only if it is introduced to prove liability for the loss. Where the evidence is introduced for a different purpose it is admissible. (*Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 396; *see Granville v. Parsons, supra*, 259 Cal.App.2d 298, 303-04; *Shepherd v. Walley*, 28 Cal.App.3d 1079, 1083.) We agree with the trial court that under the circumstances in which the evidence was offered it was not introduced to prove liability.

Mr. Huenergardt testified that when he went to visit Mrs. Beard she spontaneously told him that she had warned Alfred not to hop on the trains. This was denied by Mrs. Beard. Mrs. Beard subsequently testified that Mr. Huenergardt brought a typist to one of their meetings, asked Mrs. Beard to sign a statement, and that when she refused, saying that she wanted a lawyer, he told her that she didn't need a lawyer and that he would take care of it. In laying a foundation for Mrs. Beard's testimony, plaintiff properly asked Huenergardt whether he had made such statements. It was in the context of asking Huenergardt whether he requested Mrs. Beard's statement or told her that she did not need a lawyer because the railroad would take care of Alfred, that the question was asked "Did you, in any of the conversations you had with Mrs. Beard, have any conversation about the possibility or probability of settling this claim?" The answer was, "Yes." There were no further questions about the discussion of settlement. The question tended to impeach Huenergardt's testimony and to support Mrs. Beard's credibil-

ity by implying the use of sharp practices by the investigator in his interview with Mrs. Beard. Its relevance was to assist the jurors in determining the credibility of the parties to the conversation in which it was made, and not to prove liability. (*See Fletcher v. Western National Life Ins. Co., supra.*) The admission of the evidence was not prejudicial to appellant.

Appellant argues that plaintiff's counsel was guilty of misconduct in his argument to the jury and in making frivolous and numerous objections and arguing them in front of the jury. No objection or request for an admonition of the jury was made at the time of the alleged misconduct in argument to the jury. The trial court considered the allegations of misconduct in denying the motion for a new trial and was of the opinion that no misconduct occurred, or if it did, the jury was not prejudiced thereby. We see no ground for reversal of the judgment. (*Sabella v. Southern Pac. Co.*, 70 Cal.2d 311, 317-18 and n. 5, *cert. denied* 395 U.S. 960.)

The judgment is affirmed.

NOR FOR PUBLICATION.

Ashby, *J.*

We concur:

Kaus, *P. J.*

Hastings, *J.*

APPENDIX C.

Petition for Rehearing Denied.

Los Angeles, Cal., Jan. 10, 1974.

Title:

Beard vs. The Atchison, & T & SF Ry. No. 40540.

The Court: Petition for Rehearing Denied.

Clay Robbins, Clerk.

APPENDIX D.

Hearing Denied.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Feb. 7, 1974

I have this day filed Order Hearing Denied.

In re: 2 Civ. No. 40540. Beard vs. Atchison, Topeka and Santa Fe.

Respectfully,

G. E. Bishel
Clerk